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dence, was directed alone to the facts of that particular case. There the evidence of the defendant had been introduced, and the court could see from its inspection that it related to matters not properly provable under the general issue of not guilty, where grounds of defense had been ordered, and not filed, for the reason, as stated, that the plea of not guilty would give the plaintiff no sufficient notice that evidence of the character introduced would be relied on. It was never intended to lay down the broad proposition, now contended for, that, in any case where the defendant fails to comply with a order requiring grounds of defense to be filed, he is thereby deprived of the right to introduce any evidence in his defense, although it be apparent that the plea gave full notice that such evidence would be relied on.

As to the case of Chestnut *v.* Chestnut, supra, it is sufficient to say that there is nothing therein to justify its citation as authority in support of the proposition now under consideration. Opinions of courts, to be correctly understood, should always be read in the light of the facts of the case in which they are rendered.

As the evidence on another trial may change the whole character of the case, we will not consider the other assignments of error made in the petition.

On account of the error we have pointed out. the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial, to be had not in conflict with this opinion.

Reversed.

CITY OF NORFLOK *v.* NORFOLK COUNTY WATER CO.

March 14, 1912.

[74 S. E. 226.]

1. **Pleading (§ 214*)—Demurrer—Admissions.**—Exceptions to an answer, having the effect of a demurrer, admitted all the relevant and properly pleaded allegations thereof as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

2. **Municipal Corporations (§ 271*)—Water Supply—Duty to Furnish.**—A city is under an obligation to furnish its citizens, so far as possible, with an adequate water supply, both for public health and safety.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 726; Dec. Dig. § 271.*]

3. **Municipal Corporations (§ 57*)—Powers.**—A municipal corpo-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No Series & Rep'r Indexes.

ration cannot be deprived of its public powers by implications or presumptions; it being essential that any restrictions thereon be clearly shown.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.*]

4. Waters and Water Courses (§ 192*)—Property Conveyed.—A deed by a real estate company, which platted land and reserved to itself the fee in the streets with the right to lay water pipes therein, which conveyed to plaintiff water company "a right of way" on and under the streets for the purpose of maintaining water pipes and covenanted that grantor would not thereafter vest in any other person or corporation the right to maintain water pipes in the streets, did not give plaintiff the exclusive right to maintain water pipes in the streets, as grantor had a right to itself thereafter lay water pipes in the streets.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 279; Dec. Dig. § 192.*]

5. Waters and Water Courses (§ 183*)—Water Supply—Right to Lay Pipes—Annexed Territory.—A real estate company platted a tract near Norfolk City, reserving to itself the fee in the streets with the right to lay water pipes, and afterwards conveyed to a water company the right to lay water pipes under the streets, covenanting not to convey to another the right to do so. Acts 1901-02, c. 179, annexed such territory, designated therein as "Park Place," as a part of the city; but section 15 provided that nothing in the act should affect any easements theretofore granted in the streets of the annexed territory, and that the city should not acquire any water mains then laid in the territory, except by condemnation. In 1903 the real estate company conveyed to the city all its rights reserved in the plat, by a deed which dedicated all of the streets to the public, "save only as to such easements and rights in said streets as the grantor may have conveyed to others." Held, that neither under section 15 nor under the deed to the city could the water company claim the exclusive right to lay pipes under the streets of the annexed tract, so that the city could lay water mains thereunder, and the fact that it might become a competitor of plaintiff was immaterial.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 277, 278; Dec. Dig. § 183.*]

6. Municipal Corporations (§ 29*)—Construction—Liberal Construction—Annexation Statutes.—Statutes annexing territory to a city are to be construed liberally in favor of the public; all presumptions being against the granting of exclusive rights in favor of private persons against the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 66-75; Dec. Dig. § 29.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Appeal from Circuit Court of City of Norfolk.

Suit by the Norfolk County Water Company against the City of Norfolk. From a decree for complainant, defendant appeals. Reversed.

J. D. Hank, Jr., and *Thos. H. Willcox,* for appellant.
Pender & Way, for appellee.

HARRISON., J. This appeal involves the right of the city of Norfolk to lay and maintain water pipes and to install fire hydrants in Thirty-Seventh street of the Seventh ward of that city.

[1] The case was heard upon the bill of the Norfolk County Water Company, the answer thereto of the city of Norfolk, the exhibits filed with each and exceptions taken by the complainant to the answer of the city. These exceptions had the effect of a demurrer to other pleadings and admitted as true all the statements and allegations of the answer which were relevant and properly pleaded. Upon the hearing the circuit court sustained the exceptions, struck out the answer, and, in accordance with the prayer of the bill, perpetually enjoined the defendant from laying and constructing water pipes or mains, and from installing fire hydrants in Thirty-Seventh street of the Seventh ward of the city. From that decree the city of Norfolk has appealed.

The material facts established by the pleadings are that the Kensington Company, a corporation engaged in the real estate business, owned a tract of 100 acres of land near the city of Norfolk which it had laid off into blocks, lots, streets and alleys according to the specifications of a plat which it had recorded in the clerk's office of Norfolk county. On the face of this map the Kensington Company reserved to itself the fee in all of the streets designated thereon, together with the right to lay railroad tracks, sewer, gas, and water pipes, to erect telegraph and electric light poles and wires, and for such other reasonable purposes as to it might seem necessary.

It further appears that the Kensington Company, with a view to furnishing purchasers of its lots with water, by deed of January 4, 1900, conveyed to the appellee water company the right to go upon and under certain of its streets for the purpose of laying, constructing, and maintaining water pipes. This deed contains a covenant that the grantor will not at any time thereafter convey or otherwise vest in any other person or corporation the right to lay and maintain water pipes in the streets mentioned. In little more than two years after this deed was made and recorded, this property of the Kensington Company, together with other suburban territory, was, by an act of the Legislature approved March 14, 1902, annexed to and made part of

the city of Norfolk, and designated by the act as the "Park Place, or seventh ward of that city. Acts 1901-02, p. 171.

This annexation act, among other things, provides that nothing therein contained shall be construed as affecting any easements theretofore granted in the streets of the annexed, territory, and that the city of Norfolk shall not acquire any water mains now laid in such territory except in the manner prescribed by law for acquiring private property for the use of the city; and if the city shall not have the right to lay its water, gas, sewer, or other pipes in any streets in the annexed territory, it may condemn such right without condemning the fee in the streets.

It further appears that in June, 1902, the local board of improvement of the Seventh ward, for the purpose of furnishing fire protection to the citizens of that ward, entered into a contract with the appellee, by which it was agreed that the appellee would furnish 30 or more fire hydrants, in consideration of an annual payment by the city of $45 for each hydrant, to be located at the points designated in the contract. The appellee failed to keep and perform this contract, and has removed the hydrants established in pursuance thereof because it could not supply sufficient water pressure to make them of any value as a protection against fire.

It further appears that, by deed of April 29, 1903, the Kensington Company conveyed to the city of Norfolk all of the reservations, already mentioned as reserved on its plat, and by the same deed fully dedicated all of the streets designated on such plat to the public, "save only, as to such easements and rights in said streets as the grantor may have conveyed to others."

The contention of the Norfolk County Water Company is that it has the exclusive right to lay and maintain water pipes in Thirty-Seventh street, which is one of those embraced in the territory known as Kensington, and that to allow the city of Norfolk to lay water pipes in that street would result in the taking of its property without due process of law. In support of this contention, reliance is placed upon the term of the grant and covenant contained in the deed under which appellee holds, the terms of the annexation act, and the saving clause in the deed of the Kensington Company conveying to the city of Norfolk its reservations.

[2] The city of Norfolk is vested, under the law, with large governmental powers, vitally affecting the public interests, which it cannot fail to exercise for the promotion of the safety and welfare of its citizens. One of the paramount obligations of such a municipality is to furnish its citizens (as far as possible) with a sufficient supply of water, not only for the public health, but for the public safety as well, in order to afford the means of extinguishing fires and preventing conflagrations.

[3] A municipal corporation, when exerting its functions for the public good, cannot be shorn of its powers by implications or presumptions. If, in particular circumstances, it is sought to restrict the exercise of its public powers, the right to do so must be manifested in clear and unmistakable terms.

The city of Norfolk does not derive its rights in the premises from any individual or corporation. Such rights as it possesses have came to it under and by virtue of the annexation act, which made Kensington and other territory its Seventh ward.

[4] It is clear that the granting clause of the deed under which appellee holds does not confer upon it an exclusive right to lay and maintained water pipes in Thirty-Seventh street; the grant is merely of "a right of way" on and under the streets for the purpose of laying and maintaining water pipes. Nor does the covenant in such deed vest in the appellee the exclusive right to lay and maintain the pipes in question. The Kensington Company covenanted that it would not convey the same privilege to any other person or corporation; but this was by no means an agreement that it would never construct and maintain in its streets water pipes of its own. So far as any inhibition in this covenant is concerned, the Kensington Company had thereafter the same right, in itself, to lay water pipes in its streets that it had before the covenant was made. The appellees did not therefore have the exclusive right claimed, but enjoyed a privilege that, to say the least, was equally shared with its grantor.

[5, 6] The claim that the language of section 15 of the annexation act justifies the contention that appellee has the exclusive right to lay water pipes in Thirty-Seventh street cannot be sustained. It is well settled that such acts are to be liberally construed in favor of the public. The restrain contended for is upon a governmental agency and cannot be presumed or readily implied. The presumptions are all against the Legislature granting exclusive rights and against the imposition of limitations upon the powers of government. Water Company *v.* Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353. . It requires, however, no strict construction to hold that the act in question does not confer upon the appellee the exclusive right claimed by it. The Legislature recognized that, at the time of the annexation, certain rights in the matter of laying pipes in the streets had already been acquired, and the only purpose of section 15 of the act was to protect such rights by providing, as it did, that the city of Norfolk should not affect or acquire them except by purchase or condomnation proceedings. In other words, that if the city desired to own or use such pipes, it must acquire them in the manner prescribed by law for acquiring private property for the use of

the city. There has been no attempt to use or interfere with the easement claimed by appellee, nor to acquire any water mains laid by others. The city is merely attempting to discharge the unquestioned public duty of laying a water main in one of its streets for the purpose of furnishing the citizens of its Seventh ward with protection against fire. Nor does the saving clause in the deed from Kensington Company to the city of Norfolk furnish any ground in support of the exclusive right claimed by the appellee. The city of Norfolk does not claim the right to lay water mains in Thirty-Seventh street by virtue of this deed, but claims such right under the act which had, before the deed was executed, made the territory through which the street ran a part of such city. This deed was manifestly intended to convey to the city any rights in its streets which the Kensington Company had not theretofore parted with, and to avoid any future effect of the reservations of rights on the plat in favor of the Kensington Company, by having that company convey them to the city. The language of the deed that the grantor fully dedicates the streets to the public, "save only" as to such easements and rights in them as the grantor had before conveyed to others, was plainly not intended to vest in the appellee the exclusive right to lay water pipes in the streets.

It is admitted by the pleadings that appellee does not furnish and is unable to furnish the citizens of the Seventh ward of the city of Norfolk with protection against fire, and yet it is argued that to permit the city to lay its own pipes in Thirty-Seventh street, connected with the city water supply, for the purpose of furnishing fire protection, would be to force appellee into competition with the city, and thereby destroy the valuable business it had built up by the expenditure of large sums of money. The record does not disclose how far, if at all, the city will compete with appellee by furnishing its citizens with fire protection, which appellee confesses its inability to furnish. If, however, the laying of pipes for furnishing fire protection were to eventuate in the city's becoming a damaging competitor of appellee, such a consideration could not control or affect the legal rights of the parties. Water Company *v.* Knoxville, supra.

Upon the whole case we are of opinion that the Norfolk County Water Company does not possess the exclusive right to lay water pipes in Thirty-Seventh street of the Seventh ward of the city of Norfolk, and that therefore the exercise by the city of Norfolk of its right to lay water pipes in such street for the purpose of furnishing its citizens with fire protection is not an invasion of any legal right of the appellee, and is therefore not a taking of its property without due process of law.

The decree complained of must be reversed, and this court

will enter such decree as the circuit court ought to have entered, dismissing the plaintiff's bill.

Reversed.

CARDWELL, J., absent.

Note.

It is strange how long some questions of practice remain unsettled in this state by any authoritative decision, and this is more especially true of questions of equity practice. The case of Kelly *v.* Hamblen, 98 Va. 383, 36 S. W. 491, has given rise to the erroneous impression in the minds of some lawyers that an answer may be demurred to.

The court of appeals seemed to think itself bound to treat the case after the fashion that the lower court had treated it, but the lower court ought not to have permitted **demurrer** to be filed. It was styled an **exception** but as it raised a question of law, it was really a demurrer in disguise. The legal sufficiency of an answer cannot be tested by demurrer nor by an exception intended to have the same effect.

While there are one or two early cases where a demurrer was resorted to to test the legal sufficiency of an answer in equity, Williams *v.* Owens, 1 Chan. Cas. (Eng.), 56; Wakelin *v.* Malthal, 2 Chan. Cas. (Erg.) 8; Wyatt's Prac. Reg. 162; yet, according to the more modern equity practice, a demurrer is never resorted to to settle the validity of an answer. Such method of procedure is not recognized in any of the standard treatises on equity procedure. Barton's Suits in Eq. 96; Mitford's Pl., by Jeremy, 107; Cooper's Eq. Pl. 110; Story's Eq. Pl., ch. 9; Lube's Pl. 46, 315, 355; Hinde's Pr. 146; Blake's Pr. 107; 1 Daniells' Pr. 598; 4 Bouvier's Inst., § 4215; Raymond *v.* Simonson, 7 Blackford (Ind.) 79; Thomas *v.* Brashear, 4 Monroe (Ky.) 65; Travers *v.* Ross, 14 N. J. Equity, 254, 258; Stokes *v.* Farnsworth, 99 Fed. 836; Edwards *v.* Drake, 15 Fla. 666; Com. *v* Pittston Ferry Bridge Co., 8 Kulp (Pa.) 29; Copeland *v.* McCue, 5 W. Va. 264; Stone *v.* Moore, 26 Ill. 165; Pennsylvania Co. *v.* Bray, 138 Fed. 203; Winters *v.* Claitor, 54 Miss. 341.

A demurrer to an answer in equity is not sanctioned by the rules of practice in the federal courts. Crouch *v.* Kerr, 38 Fed. 549.

The proper method of taking advantage of the insufficiency of the answer is either by exceptions stating the objectionable parts, or, if it be not open to exceptions, by setting the case down for hearing on the bill and answer, which has the effect of a demurrer. Stone *v.* Moore, 26 Ill. 165; Walker *v.* Jack, 31 C. C. A. 462, 88 Fed. 576; Barrett *v.* Twin City Power Co., 111 Fed. 45; Thomas *v.* Stone, (Mich.) Walk. Ch. 117; Beck *v.* Beck, 36 Miss. 72; Winters *v.* Claitor, 54 Miss. 341.

In other words, if there be an answer, however defective, the complainant must either file exceptions or replication, or set down the cause for hearing upon bill and answer. Travers *v.* Ross, 14 N. J. Equity 254; Burge *v.* Burus, 1 Morris (Iowa) 287.

Objections to an answer on the ground that it is not responsive to the material allegations of the bill, Dangerfield *v.* Claiborne, 2 Hen. & M. (Va.) 17; or on the ground that it is frivolous and impertinent, Squier *v.* Shaw, 24 N. J. Eq. 74; should be raised by exception and not by motion to strike from the files. See Travers *v.* Ross, 14 N. J. Eq. 254.

If the insufficiency or impertinence of the answer is such as to

render it necessary to supply the defect by a more full answer, or to be relieved from the impertinent matter, the proper remedy is to file exceptions. Travers *v.* Ross, 14 N. J. Eq. 254, 257.

In 2 Daniells' Prac. 920, it is stated that the result of the cases appears to be, that although the court will remove from the file any document which purports to be an answer, but is not so in reality, yet if any part of such document does entitle it to fill the character which it assumes, although it is an answer to only one fact, the court will not take upon itself to decide whether it is evasive or not, but will leave the plaintiff to except to it for insufficiency.

No well-considered decision can be found where an answer has been suppressed or ordered to be taken from the file on the ground of its insufficiency or frivolousness. Travers *v.* Ross, 14 N. J. Eq. 254; Olding *v.* Glass, 1 Younge & Jervis (Eng.) 340.

An answer, of which any part entitles it to fill the character it assumes, will not be ordered to be stricken from the files. Squier *v.* Shaw, 24 N. J. Equity 74.

But the fair result of the cases, and certainly the true principle is, that if the answer is so evasive that it is obviously a mere delusion—if there is no answer of any of the material facts stated in the bill, and no reason assigned for not answering them, it will be considered as no answer, and the court on motion will order it to be taken from the file. Cooper's Eq. Pl. 313; 1 Barb. Ch. Pr. 169; Tomkin *v.* Lethbridge, 9 Vesey (Eng.) 178; Marsh *v.* Hunter, 3 Mad. (Eng.) 226; Phillips *v.* Overton, 4 Haywood (N. C.) 292.

The authorities are well-nigh unanimous that the manner of raising the question of the legal sufficiency of an answer is to set the cause down for hearing on the bill, answer and exhibits. Dixon *v.* Dixon, 61 Ill. 324; Thomas *v.* Brashear, 20 Ky. 65.

If the answer sets up no legal defense, and the material facts are all admitted, the proper course is to set the cause down upon bill and answer, or if more evidence is requisite to sustain the complainant's case, to take issue upon the answer. Travers *v.* Ross, 14 N. J. Eq. 254, 257.

In Walker *v.* Jack, 31 C. C. A. 462, 88 Fed. 576, 577, the complainant excepted to the answer for insufficiency; the trial court sustained the exception; and, the defendants declining to plead further, the court entered a decree perpetually enjoining the defendants as prayed in the bill. The Circuit Court of Appeals speaking by Judge Wm. H. Taft, said: "The court seems to have treated the exception as if equivalent to a demurrer testing the sufficiency of the averments of the answer as a defense to the bill upon its merits. This was not according to proper equity practice. There is no such thing as a demurrer to an answer in equity. Grether *v.* Wright, 23 C. C. A. 498, and 75 Fed. 742. The only way by which the sufficiency of an answer on its merits as a defense to the case made in bill can be tested is by setting the case for hearing on bill and answer. The office of an exception is to raise the question whether the averments and denials of the answer are sufficiently responsive to the allegations of the bill. In this case the averments of the answer were in every way responsive to the allegations of the bill, and left nothing to be desired in defining the sharpness of the real issue between the parties. It was therefore an error to sustain the exceptions."

These rules may be summarized as follows: Lack of responsiveness in an answer or objections for impertinence are properly raised by exceptions to the answer. But the legal sufficiency of the answer is to be tested by setting down the cause for hearing on the bill and answer, and not by demurrer.